No. 92-166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner

v.

THE UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF AMICI CURIAE OF THE CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, THE SOUTHERN UTE INDIAN TRIBE, AND THE COUNCIL OF ENERGY RESOURCE TRIBES IN SUPPORT OF PETITIONER

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Interests of Amici Curiae

The decision of the Federal Circuit Court of Appeals in *UNR Industries, Inc., et al. v. The United States*, 962 F.2d 1013 (Fed.Cir. 1992) ("*UNR*")[1] prevents Indian tribes from effectively enforcing the federal government's trust responsibility. *Amici*, the Cheyenne-Arapaho Tribes of Oklahoma, the Southern Ute Indian Tribe, and the Council of Energy Resource Tribes (CERT) support petitioner in challenging the *UNR* decision.[2]

The United States holds oil and gas resources in trust for the Cheyenne-Arapaho Tribes of Oklahoma. In 1976 the Tribes entered into five-year oil and gas leases with two oil companies. As those leases were about to expire, the government approved, without Tribal consent, communitization agreements that would have extended the terms of the oil and gas leases on Tribal land. The Tribes filed suit for agency review and injunctive relief in federal district court. *Cheyenne-Arapaho Tribes of Oklahoma v. United States et al.*, No. CIV-84-1765-A (D.Okla. filed 1984). The Tribes sought to void the government's approval and to keep the agreements from taking effect. The Tribes later filed an action in the United States Claims Court to recover any damages resulting from the government's improper approval of the agreements. *Cheyenne-Arapaho Tribes of Oklahoma v. United*

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[1] That is the *in banc* opinion of the Federal Circuit. The earlier panel decision is reported at *UNR Industries, Inc. v. United States*, 911 F.2d 654 (Fed.Cir. 1990). The Claims Court opinion is reported at *Keene Corporation v. United States*, 17 Cl.Ct. 146 (1989).

[2] Pursuant to Rule 37.3, written consents from counsel of record for the parties have been filed with the Clerk of the Court.

States, No. 247-87L(Cl.Ct. filed 1987). The Claims Court suit was stayed pending the outcome of the district court litigation. The district court ruled for the Tribes in 1989, holding that the government had breached its trust responsibility to the Tribes, and that decision has been affirmed by the Tenth Circuit Court of Appeals. *Cheyenne-Arapaho Tribes of Oklahoma v. The United States of America, et al.*, 966 F.2d 583 (10th Cir. 1992). The government has moved to dismiss the Tribes' Claims Court case on the basis of 28 U.S.C. §1500 and the Federal Circuit's recent decision in *UNR*, 962 F.2d 1013. Consideration of the motion has been postponed to await the decision in this case.

The Southern Ute Indian Tribe is the beneficial owner of coal underlying the Southern Ute Indian Reservation. The United States holds legal title to the coal as trustee for the Tribe but in many instances the remainder of the estate is privately owned. On those lands, oil companies and landowners have begun to develop substances commonly known as coalbed methane from the Tribe's coal without Tribal consent. Although holding the coal in trust, the federal government has refused to protect the Tribe's resources. The Tribe filed suit in federal district court against the oil companies and the landowners to stop development of the coalbed methane in the absence of Tribal consent. *Southern Ute Indian Tribe v. Amoco Production Co.*, No. 91-B-2273 (D.Colo. filed 1991). The Tribe also sued the Secretary of the Interior (and subordinates) for injunctive relief. The Tribe seeks to force the Department of the Interior to carry out the government's duties as trustee for the Tribe. The Tribe filed a second suit in the Claims Court for damages for the United States' past failure to protect the Tribe's interest in coalbed methane. *Southern Ute Indian Tribe v. United States*, No. 92-99L (Cl.Ct. filed 1992). The Claims Court has dismissed the Tribe's suit based on 28 U.S.C §1500 and the *UNR* decision.

CERT is a national organization of over forty federally-recognized Indian tribes. CERT was founded in 1975 to provide member tribes with professional assistance in the protection, management, and development of their energy resources. Both the Cheyenne-Arapaho Tribes and the Southern Ute Indian Tribe are members of CERT.

The Cheyenne-Arapaho Tribes of Oklahoma and the Southern Ute Indian Tribe have a significant interest in supporting the consistent and longstanding interpretation of 28 U.S.C. §1500 made by the United States Court of Claims, the Federal Circuit Court of Appeals, and the United States Claims Court before the Federal Circuit's decision in *UNR*. The Tribes relied on that interpretation in proceeding against the federal government in United States district courts and in the United States Claims Court. If the *UNR* decision stands, the Tribes' Claims Court suits would be subject to dismissal and the government, although in breach of its responsibilities, would not be accountable in damages. CERT, and Indian tribes generally, have an interest in making sure that tribes have the ability to effectively enforce the federal government's fiduciary obligations to tribes.

Summary of Argument

Before the Federal Circuit's *UNR* decision, the Court of Claims, the Claims Court, and the Federal Circuit itself correctly interpreted 28 U.S.C. §1500 to

allow simultaneous suits where only nonmonetary relief was sought in federal district court and money damages were sought in the Claims Court. Congress had the opportunity to change that interpretation but has not done so. The *UNR* decision reverses the long-standing practice of the courts and Congress' endorsement of that practice. The decision will have the practical effect of barring valid damages claims against the government. Amici join petitioner in seeking reversal of *UNR*.

Argument

I. Introduction

The *UNR Industries* decision involves the interpretation of 28 U.S.C. §1500.[3] In its present form that statute provides:

> The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

[3] 28 U.S.C.A. §1500 (West Supp. 1992). This statute is based on §1500 of the 1948 Judicial Code, Act of June 25, 1948, 62 Stat. 869; §154 of the Act of March 3, 1911, 36 Stat. 1138; R.S. §1067.

UNR is a consolidation of eight cases involving asbestos manufacturers and suppliers.[4] In those cases, the claimants sought money damages from the government in federal district courts and, under different theories, in the Claims Court. The Claims Court dismissed the cases. *Keene Corp. v. United States*, 17 Cl. Ct. 146. The Federal Circuit reversed the dismissal. *UNR Industries v. United States*, 911 F.2d 654. In December 1990, the Federal Circuit granted the government's suggestion for rehearing in banc and vacated the judgment entered in 911 F.2d 654. *UNR Industries, Inc. v. United States*, 926 F.2d 1109 (Fed.Cir. 1990). A month later the court ordered further briefing on certain issues. *UNR Industries, Inc. v. United States*, 926 F.2d 1109 (Fed.Cir. 1991).

The *UNR* decision came down in April 1992. The Claims Court's 1989 dismissal of the *UNR* plaintiffs' cases was affirmed. The court ruled that: (1) if the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction, regardless of when an objection is raised or acted on; (2) if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction, regardless of when the court memorializes the fact by order of dismissal; and (3) if the same claim has been finally disposed of by another court before the complaint is filed in the

[4] A detailed background of the *UNR* cases is set out in the *UNR* Claims Court opinion. *Keene Corp.*, 17 Cl.Ct. at 149-155.

The *UNR* cases are related to three other asbestos cases. *SeeKeene Corp. v. United States*, 12 Cl. Ct. 197 (1987), *aff'd Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed.Cir. 1988) *cert. den.* 489 U.S. 1066 (1989).

Claims Court, ordinary rules of res judicata and available defenses apply. *UNR*, 962 F.2d at 1021.

As noted, it appears that *UNR* involves cases where money damages were sought in the district courts and in the Claims Court. The Federal Circuit, however, went beyond the facts before it in *UNR* to rule that 28 U.S.C. §1500 divested the Claims Court of jurisdiction of a claim for money damages where the same underlying facts were the basis of a suit against the government for nonmonetary relief in federal district court. The court did so by overruling *Casman v. United States*, 135 Ct.Cl. 647 (1956) and "cases like *Casman*". *UNR*, 962 F.2d at 1022 n.3.

Amici submit that *Casman* was correctly decided and that the part of *UNR* that overruled *Casman* should be reversed.

II. Section 1500 Does Not Require the Dismissal of an Action in the Claims Court Where There is a Simultaneous Suit for Only Nonmonetary Relief in District Court

The court in *UNR* described the "judicial development" of §1500 as "erratic". *UNR*, 962 F.2d at 1019. A review of the cases, though, reveals a clear and consistent thread. From the Court of Claims' decision in *Casman*, to the Federal Circuit's decision in *Boston Five Cents Savings Bank v. United States*, 864 F.2d 137 (Fed.Cir. 1988), to the Claims Court's decision in *Marks v. United States*, 24 Cl.Ct. 310 (1991), the courts uniformly held that claimants could pursue money damages in the Claims Court and nonmonetary relief in district court. Those decisions are consistent with the purposes of §1500 and the actions of Congress over the years. The decisions allow for the protection of valid damages claims against the government that might otherwise be barred by the statute of limitations.

A. Section 1500 Was Not Enacted to Preclude Suit in the Claims Court When Only Nonmonetary Relief Is Sought in the District Court

Early on, the Court of Claims recognized that where a party sought only nonmonetary relief in the district court and damages in the Court of Claims, neither the letter nor the spirit of §1500 required dismissal of the Court of Claims action. *Casman*, 135 Ct.Cl. 647. The Court of Claims consistently followed *Casman*. *Allied Materials & Equipment Company, Inc. v. United States*, 210 Ct.Cl. 714 (1976); *City of Santa Clara, California v. United States*, 215 Ct.Cl. 890 (1977); *Pitt River Home and Agricultural Cooperative Association v. United States*, 215 Ct.Cl. 959 (1977); *Hossein v. United States*, 218 Ct.Cl. 727 (1978); *Prillman v. United States*, 220 Ct.Cl. 677 (1979); *Truckee-Carson Irrigation District v. United States*, 223 Ct.Cl. 684 (1980); *Deltona Corp. v. United States*, 222 Ct.Cl. 659 (1980).[5] Before the *UNR* decision, the Federal Circuit and the Claims Court continued to follow *Casman*. *Boston Five Cents*, 864 F.2d 137; *Marks*, 24 Cl.Ct. 310.

The "*Casman*" interpretation is consistent with the purpose of §1500 and the broader jurisdictional

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[5] By contrast, in cases where money damages were sought in the district court and the Court of Claims or the Claims Court, the court would, in most instances, apply §1500 and dismiss the case. *See e.g. British American Tobacco Co. v. United States*, 89 Ct.Cl. 438 (1939); *cert. den.* 310 U.S. 627 (1940); *Frantz Equipment Co. v. United States*, 120 Ct.Cl. 312, 98 F.Supp. 579 (1951); *Nonella v. United States*, 16 Cl.Ct. 290 (1989).

scheme of the federal courts. The purpose of §1500 is to force a claimant to elect between suing in the Claims Court and other courts to prevent duplicative litigation. *UNR*, 962 F.2d at 1021. There is, however, no duplication when equitable relief is sought in the district court and damages are sought in the Claims Court. Although such cases may be based on the same facts, the solution is for the Claims Court to stay its hand until the district court litigation is complete. Indeed, it was the common practice of the Claims Court to do just that in these kinds of cases. *Truckee-Carson*, 223 Ct.Cl. at 685-686; *Prillman*, 220 Ct.Cl. at 679. The resolution of legal and factual issues in the district court would be binding on the parties in the Claims Court and there would be no need to relitigate those issues. *See e.g. Beverly v. United States*, 24 Cl.Ct. 197 (1991). Further, the result would be precisely the same even if §1500 applied and a claimant litigated a district court action to completion and then filed suit in the Claims Court (assuming the statute of limitations did not bar the second suit).

B. Congress Has Accepted the Interpretation of Section 1500 that Allows Simultaneous Suits Where Only Non-monetary Relief is Sought in the District Court

The *Casman* interpretation of §1500 is also consistent with the actions of Congress over the years. In 1982 Congress essentially reenacted §1500 when it created the Claims Court and amended §1500 to make it applicable to the Claims Court. The Federal Courts Improvement Act of April 2, 1982, P.L. 97-164, 96 Stat. 25, 40. Although it could have, Congress made no other changes to §1500in 1982. Between the reenactment of §1500 in 1948 and the 1982 amendment to §1500, the Court of Claims issued eight reported decisions in which it held that §1500 did not apply when a claimant sought equitable relief in the district court and damages in the Court of Claims. That is evidence of adoption by Congress of the "settled" *Casman* interpretation of §1500. *Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 5, 14 (1939) ("Congress has not seen fit to amend the statute in this respect and we must assume that it has been satisfied with, and adopted, the construction given to its enactment by the courts."); *Square D Co. v. Niagra Frontier Tariff Bureau*, 476 U.S. 409, 419-420 (1986); *see also Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

Moreover it is clear that during the time the *Casman* interpretation became the "settled law" of the Court of Claims, Congress was aware of the problems caused by the allocation of jurisdiction between the district courts and the Court of Claims. In both 1972 and 1982, Congress amended the Tucker Act to give the Court of Claims, and later the Claims Court, limited jurisdiction to provide affirmative relief. *See* 28 U.S.C. §1491(a)(2),(3). The addition of §1491(a)(3) to the Tucker Act gives the Claims Court limited authority to award equitable relief before the award of government contracts. The committee report on that amendment states, "this provision will avoid the costly duplication in litigation presently required when a citizen seeks both damages and equitable relief against the government" S.Rep. No. 97-275, 97th Cong., 2d Sess. 22, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 32. In amending the Tucker Act and in establishing the Claims Court, Congress did not see fit to change the "settled" *Casman* interpretation of §1500. "Under these circumstances it is a fair as-

sumption that by reenacting without pertinent modification . . . Congress accepted the construction . . . approved by the courts." *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 366 (1950).

C. Section 1500 Should Not be Interpreted So as to Prevent the Assertion of Valid Damages Claims Against the Government

The federal district courts have jurisdiction to review federal agency action, to award equitable relief against the government, and to award damages of less than $10,000 against the government. The Claims Court has exclusive jurisdiction to award damages of more than $10,000 against the government. The statute of limitations for cases in the Claims Court is six years. 28 U.S.C. §2501. Under that jurisdictional scheme, the *UNR* decision will have the practical effect of barring the assertion of valid damages claims against the government.

If government activity gives rise to a cause of action for damages exceeding $10,000, the *UNR* decision forces a claimant to choose between suing for damages in the Claims Court or suing to review and enjoin the activity in district court. If a claimant sues first in Claims Court and the court finds that the government is acting illegally, it is without jurisdiction to stop the unlawful activity. If a claimant sues first in the district court and the district court litigation takes more than six years, the claimant will be barred by the statute of limitations from filing a later suit for damages in the Claims Court.

The situations of *amici* Cheyenne-Arapaho Tribes and the Southern Ute Tribe illustrates this point. Although the Cheyenne-Arapaho Tribes have, so far, established a breach of the government's trust responsibility, *see Cheyenne-Arapaho Tribes of Oklahoma v. The United States of America, et al.*, 966 F.2d 583, they would be unable to obtain damages for that breach. They could not assert a damages claim in the district court because that court's jurisdiction is limited to actions for less than $10,000. 28 U.S.C. §1346(a)(2). They could not refile their Claims Court case because the six year statute of limitations, 28 U.S.C. §2501, would have run on their claims. The litigation of the Southern Ute Tribe is at an earlier stage but the Tribe faces the same prospect. Its Claims Court suit has been dismissed as a result of the Federal Circuit's *UNR* decision. If the Tribe's district court action takes more than six years to complete, it too would be barred from seeking damages by the statute of limitations.

Conclusion

For the foregoing reasons, the Supreme Court should reverse that part of *UNR Industries* that overrules the *Casman* interpretation of 28 U.S.C. §1500.

Respectfully submitted,

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December 1992